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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 516

DAISY B. WOOTON, (MRS. RICHARD G. WOOTON) WIDOW OF RICHARD G. WOOTON, DECEASED; ELLIOTT T. WOOTON AND LYNELL WOOTON AND RICHARD G. WOOTON, JR., AS ALL THE HEIRS OF RICHARD G. WOOTON, DECEASED, *Petitioners,*

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Opinion	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	2
Specification of Errors to be Urged	3
Reasons for Granting the Writ	3
Appendix	11

Cases Cited

Bank of California, National Association, et al., v. *Commissioner of Internal Revenue*, 133 Fed. 2d 428 (C.C.A. 9th 1943) 6

Brier Hill Steel Co. v. *United States*, 45 F. Supp. 209 (Ct. Cls. 1942) 9

National Refining Co. v. *United States (Reconstruction Finance Corp., Intervener)*, 160 Fed. 2d 951 (C.C.A. 8th 1947) 7

United States v. *Certain Lands in St. Charles County, Mo.*, 71 F. Supp. 76 (D.C., E.D. Mo., 1946) 9

Wardman v. *Leopold*, 85 Fed. 2d 277 (App. D.C. 1936) 5

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Petitioners, Daisy B. Wooton, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above cause October 3, 1949 (R. 5).

Opinion

The opinion of the Court of Claims (R. 5-8) has not yet appeared in the official reports.

Jurisdiction

The judgment of the Court of Claims was entered on October 3, 1949 (R. 8). The jurisdiction of this Court

is invoked under Sec. 288(b) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

This petition questions the correctness of the decision of the Court below in holding:

(1) That Sec. 3477 of the Revised Statutes (31 U. S. C., 1946 Ed., 203) precludes, as a matter of law, the petitioners from maintaining their claim;

(2) That Sec. 159 of the Act of March 3, 1911 (36 Stat. 1087, 1139; 28 U. S. C., 1946 Ed., 265; 28 U. S. C. revised, 1503) precludes, as a matter of law, the petitioners from maintaining their claim.

Statutes Involved

The pertinent statutes are printed in the Appendix, infra, pages 11-13.

Statement

The petitioners brought this suit to recover $52,858.67, with interest, representing the total of overpayments of income tax by F. T. Newton and his wife, Ethel Flurry Newton, who were engaged in construction work for the Government, for the years 1941, 1942 and 1943. The petitioners' claim is founded upon an agreement between the Newtons and Richard G. Wooton whereby the fund in question was to pass to Richard G. Wooton in payment for legal services rendered by him in establishing the claim for overpayments.

The facts are as follows:

F. T. Newton and Ethel Flurry Newton, his wife, overpaid their Federal income tax for the years 1941, 1942 and 1943 in the aggregate sum of $52,858.67. F. T. and Ethel

F. Newton agreed that their right, title and interest to and in such overpayments of income tax for the years 1941 to 1943 inclusive was to pass to the decedent, Richard G. Wooton, as payment for legal services already performed and to be later performed in contesting the assertion of the Commissioner of Internal Revenue for deficiencies in income taxes and a claim of the Government for $223,000, miscellaneous taxes, against F. T. Newton and his wife. A part of the services rendered by Richard G. Wooton consisted of obtaining a vacation of a pending claim by the Bureau of Internal Revenue for additional income taxes, the establishment of the right to refund of income taxes in the amount of $52,858.67, and a reduction of the $223,000 claim by the Government for miscellaneous taxes related to payrolls of the operations of the Newtons to $108,000.

At the time of the execution of the instrument above mentioned, F. T. and Ethel Flurry Newton were indigent and unable otherwise to pay Richard G. Wooton for the extensive services undertaken and the substantial out-of-pocket expenses to be advanced. On April 9, 1945, the Committee on Practice of the Treasury Department considered the arrangement made between F. T. and Ethel F. Newton and Richard G. Wooton and found it acceptable.

F. T. and Ethel F. Newton were adjudicated bankrupts on August 31, 1944, by appropriate proceedings in the United States District Court for the Southern District of Mississippi in Cause No. 189. The reduced amount of $108,000 for miscellaneous taxes due the United States was one of the debts owed by the bankrupts. On or about May 12, 1949, this amount, with interest, was paid by the Trustee in Bankruptcy (R. 8, Motion for Leave to File an Amended Petition).

The amount of income tax overpaid by F. T. Newton and his wife for 1941, 1942 and 1943 was determined and allowed by the Commissioner of Internal Revenue in the sum of

$52,858.67 and said sum was certified by him to the Comptroller General on or about July 20, 1947, as taxes erroneously collected, overpaid and refundable. The Comptroller General has failed and refused to pay petitioners the amount of the overpayments so certified. Petitioners' demand, made August 21, 1947, that said sum be paid to them was denied by the Comptroller General.

Subsequent to the denial of petitioners' demand for payment of August 21, 1947, to the Comptroller General, the Trustee in Bankruptcy petitioned the Referee in the bankruptcy proceeding No. 189 to set off the amount of the overpayment of $52,858.67, the fund here involved, against the miscellaneous taxes in the amount of $108,000, admittedly due by and from the bankrupts, F. T. and Ethel F. Newton, to the Collector of Internal Revenue for the District of Mississippi. This petition of the Trustee in Bankruptcy was opposed by the Government on the ground that the Referee and the Bankruptcy Court have no jurisdiction over the overpayment of $52,858.67 above mentioned. The sum due the Government of $108,000, with interest, was subsequently paid from other funds marshaled by the Trustee in Bankruptcy.

On February 3, 1949, the petitioners filed a petition for judgment and other relief with the Court of Claims of the United States seeking relief in this matter. On October 3, 1949, the Court of Claims sustained the defendant's demurrer and the petition was dismissed (R. 8).

Specification of Errors to Be Urged

The Court of Claims erred:

(1) In holding that Sec. 3477 of the Revised Statutes (31 U. S. C., 1946 Ed., 203) prevented F. T. and Ethel F. Newton on the one hand and R. G. Wooton on the other from entering into the arrangement they did;

(2) In holding that Sec. 159 of the Act of March 3, 1911 (36 Stat. 1087, 1139; 28 U. S. C., 1946 Ed., 265; 28 U. S. C. revised, 1503) prevented petitioners from enforcing their claim against the fund involved. (This point has been rendered moot by the payment of the tax deficiency and therefore no discussion on this point is presented.)

(3) In sustaining the demurrer of the defendant.

Reasons for Granting the Writ

The case is predicated upon an equitable lien created in favor of the petitioners. The instrument creating such an equitable lien provided that the plaintiff's compensation was the amount of the fund recovered. Where the services of the attorney, Richard G. Wooton, were indispensable to the creation of the fund here in issue, it is of the very essence of equity that his claim for services be regarded as a lien against the fund so created. "It is generally held, where an attorney contracts for the prosecution of a case for a contingent fee, payable out of the fund recovered, that an equitable lien is created against the fund and attaches to it when it is recovered." *Wardman* v. *Leopold*, 85 Fed. 2d 277, at 280 (Ap. D. C. 1936).

The opinion of the Court of Claims below is in irreconcilable conflict with the opinions of other Federal lower Courts where this question has arisen. It has long been held that Sec. 3477 of the Revised Statutes (31 U. S. C., 1946 Ed., 203) is designed for the protection of the Government. This important principle, as well as the disagreement between the Court of Claims and other Federal lower Courts, presents a question whose resolution extends beyond the particular facts and parties involved here and presents the broad question of practice before Government agencies in general.

In *Bank of California, National Association, et al.*, v. *Commissioner of Internal Revenue*, 133 Fed. 2d 428 (C. C. A. 9th 1943), a case which among other things dealt with the valuation of a decedent's claim for refund of overpayment of income tax, the petitioners asserted that the claim for refund was not assignable and hence could not have any fair market value. The Court rejected the argument on the ground that Sec. 3477 is for the protection of the United States and, furthermore, despite the prohibition contained in Sec. 3477, such an assignment is valid as between the parties thereto.

In the *Wardman* case, *supra*, the situation there presented was quite similar to the arrangement between the Newtons and Wooton. With respect to the fund recovered, the Court said, "But in a speculation of this sort the parties naturally turn their eyes toward the future and aimed at the fruits when they should be gained. They therefore used words of contract rather than of conveyance; but the important thing is not whether they used the present or the future tense, but the scope of the contract. In this case it aimed only at the fund. Barnes gave no general promise of reward; he did not even give a promise qualified and measured by success to pay anything out of his own property, referring to the fund simply as the means that would enable him to do it * * * he promised only that if, when, and as soon as he should receive an identified fund, one-third of it should go to the appellees. But he promised that. At the latest, the moment the fund was received the contract attached to it as if made at that moment." 85 Fed. 2d 277, at 280.

In that case it was also urged that the agreement between the parties was void under Sec. 3477 of the Revised Statutes (31 U. S. C., 1946 Ed., 203). With respect to the agreement between the parties in the *Wardman* case, an agreement which is indistinguishable from the agreement in the

case at bar, the Court said, "There was no assignment here of any claim against the government. The contract merely looked to the future, toward a possible recovery, and provided for payment of plaintiffs' fees out of the sum to be recovered. There is a sharp distinction, which the courts recognize, between a void attempt to assign a claim pending against the government and an attempt to impress upon a fund an equitable lien for a fee to be paid under contract from the amount recovered. Until there had been an award to Wardman, no interest in the fund in question accrued in favor of plaintiffs, since no part of the claim against the government had been assigned to them. But when the amount to be paid had been ascertained, and all that remained to be done was the delivery of a draft to Wardman for the money found to be due, then plaintiffs' lien attached and became enforceable in an equity proceeding against the fund, which still remained in the hands of the government." 85 Fed. 2d 277, at 281.

National Refining Co. v. *United States (Reconstruction Finance Corp., Intervener)*, 160 Fed. 2d 951 (C. C. A., 8th 1947), is a case in which another Circuit Court has recognized the validity of equitable liens resulting from agreements relating to funds not yet determined as of the date of agreement despite the fact that Sec. 3477 of the Revised Statutes was interposed as a defense. In that case, one McDowell rendered services for the Government as an agent in securing options upon land for the War Department. In October, 1940, McDowell entered into an agreement with the appellant whereby commissions to be earned by him under his agency contract with the Government were to be turned over to the appellant as they were earned and became payable. A fund was deposited by the Government in the Registry of the Court in May, 1945. The Government claim to the fund was based upon a lien for unpaid Federal taxes assessed against McDowell for the years 1935

to 1945. The lien was perfected in July, 1945, in accordance with 26 U. S. C. A., Internal Revenue Code, Sec. 3672, by the recording of notices of tax lien. The Government also sought to assert the right to set off the fund against McDowell's unpaid taxes. The Court there again held that the Statute (31 U. S. C. A., Sec. 203) is to protect the Government against the danger of conflicting claims and multiple liability. In that case, the Court held that "The fund in suit thereafter belonged to whoever could establish the best right to it. Appellant makes no claim against the Government. The claim is solely against the fund in the possession of the District Court. The appellant and the Government are merely rival claimants to the fund which the District Court has jurisdiction to distribute." 160 Fed. 2d 951, at 955. The Circuit Court of Appeals directed that the fund be awarded to the appellant, National Refining Company which had asserted an equitable lien on the fund.

In another lower Federal Court case, the Court's holding is in conflict with the opinion of the Court of Claims below. In that case an agreement was entered into between R. Newton McDowell and Blatchford Downing whereby funds to become due to McDowell from the Government for securing options upon land for the War Department were to be paid to Mr. Downing for legal services theretofore rendered and thereafter to be rendered. Funds were deposited into the Registry of the District Court. The Collector of Internal Revenue attempted to levy against the funds for Federal taxes due and owing by Mr. McDowell. The District Court held that the rights and title of Mr. Downing "are prior in time and senior and paramount to the claims of the United States or its Collector of Internal Revenue for the 6th District of Missouri * * * and they are not subject to any deduction by way of set-off in favor of the United States on account of such tax claims and said Downing is entitled to have such amounts paid and distributed to him

• • •'' *United States* v. *Certain Lands in St. Charles County, Mo.*, 71 F. Supp. 76, at 78 (D. C., E. D. Mo., 1946).

The Court of Claims itself in *Brier Hill Steel Co.* v. *United States*, 45 F. Supp. 209 (Ct. Cls. 1942), recognized that Sec. 3477 of the Revised Statutes (31 U. S. C. 1946 Ed., 203) did not prevent the recovery of a fund for the benefit of another claiming through the original claimant. In that case, the Youngstown Sheet and Tube Company had purchased all the assets of the Brier Hill Steel Company which had overpaid its income taxes. Youngstown Sheet and Tube Company later sought to set off this overpayment against deficiencies of its own. This was allowed by the Court of Claims which held that the suit while brought in the name of the Brier Hill Steel Company, was ''for the sole use and benefit of Youngstown Sheet and Tube Company'' and that Youngstown had acquired ''legal or equitable title to all of plaintiff's assets.'' In that case the Court interpreted Sec. 3477 of the Revised Statutes as follows: ''It is evident that the plaintiff would have included its claim for refund of the overpayment among the assets transferred except for R. S. §3477, 31 U. S. C. A., Sec. 203, prohibiting assignment of claims against the United States. *What it did was to transfer its claim so far as this statute permitted.* Had it been possible to have made a legal assignment of it and had this been done, there would seem to be but little doubt that the facts above referred to would require the overpayment to be credited against the deficiency, and for the payment of interest on the overpayment only until the due date of the deficiency. There was no legal assignment of the claim for the overpayment, but there was an equitable assignment, and the overpayment, in fact, was due the Youngstown Sheet and Tube Company.'' (Italics added.) 45 F. Supp. 209, at 219, 220.

As indicated above, the Federal Courts of at least two circuits, the 8th and 9th, have found Sec. 3477 of the Revised

Statutes did not prevent the recognition of the validity of equitable liens. The decision of the Court of Claims below is in sharp conflict with these Circuit Court decisions. Since it is the function of the Supreme Court to resolve conflicts of opinion on Federal questions that have arisen among lower Courts and to pass upon questions of wide import under the laws of the United States, the writ of certiorari should issue.

It is important that the Supreme Court hear this case. The question presented is of broad significance and is of high public interest beyond the facts herein presented and the parties involved. The equitable lien is a device which enables many indigent persons to prosecute their claims against the Federal Government by making it possible for them to arrange a satisfactory method of payment for legal services indispensable to the prosecution of their claim. It was not the purpose of Sec. 3477 of the Revised Statutes to unjustly enrich the Federal Government by preventing persons of small means from ever reaching a forum. For these reasons and because the decision of the Court below appears clearly wrong, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Date: December 30, 1949.

APPENDIX

TITLE 31.—MONEY AND FINANCE

§ 203. Assignments of claims void. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share, thereof, except as provided in section 204 of this title,* shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided,*

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

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* The words "except as provided in section 204 of this title" should be omitted, or changed to read, "except as hereinafter provided," the exception being probably intended to refer to the provision now embraced in the last sentence of this section.

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with——

(a) the General Accounting Office,

(b) the contracting officer or the head of his department or agency,

(c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and

(d) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this paragraph and the following paragraph shall constitute a valid assignment for all purposes.

Any contract entered into by the Department of the Army or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract. As amended Oct. 9, 1940, c. 779, §1, 54 Stat. 1029; July 26, 1947, c. 343, Title II § 205(a), 61 Stat. 501.

TITLE 28.—JUDICIAL CODE AND JUDICIARY

§ 250. (Judicial Code, section 145.) Jurisdiction. The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the

United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims" or to hear and determine other claims which, prior to March 3, 1887, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same. (Mar. 3, 1887, c. 359, § 1, 24 Stat. 505; Mar. 3, 1911, c. 231, § 145, 36 Stat. 1136.)

(2) *Set-offs.* Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the General Accounting Office fails to act finally thereon within six months after the account is received in said office. (Mar. 3, 1887, c. 359, § 1, par. 2, 24 Stat. 505; June 27, 1898, c. 503, § 1, 30 Stat. 494; July 1, 1898, c. 546, § 3, 30 Stat. 649; Mar. 3, 1911, c. 231, § 145, par. 2, 36 Stat. 1137.)

(3) *Disbursing officers.* Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible. (R. S. § 1059; Mar. 3, 1911, c. 231, § 145, par. 3, 36 Stat. 1137.)